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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN THOMAS BORRA, Defendant and Appellant.	H034806 (Santa Clara County Super.Ct.Nos. CC828915, FF827823)

Defendant John Thomas Borra pleaded no contest to counts 1 and 5 of a five-count amended information, possession of a controlled substance (hydrocodone) and fleeing a pursuing peace officer's motor vehicle. His plea was entered with the understanding that he would be granted probation, receive a four-month county jail term, and would have the remaining counts dismissed. After the sentence was suspended and defendant was granted probation pursuant to the terms of his plea bargain, one of the remaining counts (count 3) was dismissed.

Defendant asserts that because a specific term of his agreement to plead no contest to two of the counts was the understanding that the remaining three counts (counts 2, 3, and 4) would be dismissed, he is entitled to specific performance of his plea bargain through the dismissal of the two remaining counts. We agree that dismissal of the three remaining counts in the amended information was a key promise and inducement to defendant's agreement to plead no contest to count 1 and count 5. We conclude that

specific enforcement of the plea bargain is appropriate. Accordingly, we will amend the order of August 6, 2009, granting probation in superior court case number CC828915 to include an order, pursuant to the People's motion, dismissing count 2 and count 4 (in addition to the dismissal of count 3 as previously reflected in the order). As amended, we will affirm the order granting probation.

FACTS[1]

On the afternoon of December 22, 2008, San Jose Police Officer Christopher Lewis observed defendant behind the wheel of a truck parked outside of a Bank of America. At the time, multiple warrants for defendant's arrest were outstanding. Officer Lewis, who was in front of defendant's truck, turned on his flashing lights above his patrol vehicle, and another officer behind the truck did the same. Defendant drove his truck forward, jumped a curb, and went into a nearby supermarket parking lot. Because defendant's truck was stopped in traffic in the parking lot, Officer Lewis and other officers were able to approach him on foot. After defendant disobeyed a number of officer commands to get out of his truck, officers physically removed defendant. During a search incident to the arrest, Officer Lewis found a pill bottle on defendant's person containing hydrocodone, oxycodone, and clonazepam.

PROCEDURAL BACKGROUND

Defendant was charged by amended information in superior court case number CC828915[2] with two felonies and three misdemeanors, namely, possession of a

[1] Our summary of the evidence is taken from testimony at the preliminary examination in superior court case number CC828915.

[2] The joint notice of appeal filed by defendant was also from superior court case number FF827823, wherein defendant pleaded no contest to theft or unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a)), possession of a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (c)), and received a suspended sentence and a grant of probation subject to the condition that he serve four (continued)

controlled substance, i.e., hydrocodone, a felony (Health & Saf. Code, § 11350, subd. (a); count 1); possession of a controlled substance, i.e., oxycodone, a felony (Health & Saf. Code, § 11350, subd. (a); count 2); possession of a statutorily designated substance (Diazepam) without a prescription, a misdemeanor (Health & Saf. Code, § 11375, subd. (b)(2); count 3); resisting, delaying or obstructing a peace officer, a misdemeanor (Pen. Code, § 148, subd. (a)(1); count 4); and fleeing a peace officer's moving vehicle, a misdemeanor (Veh. Code, § 2800.1, subd. (a); count 5). On July 13, 2009, defendant entered a plea of no contest to count 1 and count 5. He did so with the understanding that he would receive a grant of probation upon the condition that he would spend four months in the county jail, with this jail term to be served consecutively to a jail term imposed in another case (superior court case no. FF827823) in which he was also granted probation. Before accepting the plea, defendant was apprised fully of the rights he was giving up as a result of his no contest plea and concerning the consequences of that plea. Counsel stipulated that there was a factual basis for the plea, and the court found the existence of such a factual basis. The assistant district attorney responded in the affirmative in response to the court's question: "Pursuant to the agreement, do the People move to dismiss remaining counts and allegations against the defendant to whom that applies?"[3] The court then indicated that the motions would "be taken under submission to be granted at the time of sentencing." The clerk's minutes, inexplicably, refer only to the dismissal of count 3.

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months in county jail In that related action, count 2 of the four-count information was dismissed pursuant to the plea bargain. The instant appeal concerns whether the trial court erred in its failure to dismiss counts 2 and 4 of the amended information in superior court case number CC828915 consistently with defendant's plea bargain. Accordingly, the facts and procedural history of superior court case number FF827823 are not germane here.

[3] The change of plea by defendant took place at a hearing in which two other individuals pleaded guilty to charges alleged against them in separate informations.

On August 6, 2009, the court suspended imposition of the sentence and granted probation for a period of three years upon condition that defendant serve four months in the county jail. The court dismissed count 3. Defendant filed a timely appeal based upon the sentence or other matters occurring after the plea.[4]

DISCUSSION

Defendant contends that the court erred when it failed to dismiss counts 2 and 4 of the amended information consistently with the plea bargain he had negotiated. He seeks specific performance of the terms of that plea bargain. The Attorney General concedes that defendant is entitled to a dismissal of counts 2 and 4. We agree that the court erred and that defendant is entitled to have his plea bargain specifically enforced.

"Plea bargaining is an accepted practice in American criminal procedure. [Citation.] The process is not only constitutionally permissible [citation], but has been characterized as an essential and desirable component of the administration of justice. [Citation.] Concomitant with recognition of the necessity and desirability of the process is the notion that the integrity of the process be maintained by insuring that the state keep its word when it offers inducements in exchange for a plea of guilty." (*People v. Mancheno* (1982) 32 Cal.3d 855, 859-860, fn. omitted (*Mancheno*); see also *Santobello v. New York* (1971) 404 U.S. 257, 260-261.) Both sides must adhere to the agreement's terms, and "[t]he punishment may not significantly exceed that which the parties agreed upon." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.)

As the United States Supreme Court has acknowledged, principles of due process apply both to the process by which the plea is accepted and the implementation of the

[4] Defendant—citing Penal Code section 1237, subdivision (b)—contends erroneously that "[t]his appeal is from an order made after judgment affecting the substantial rights of the appellant." The appeal is in fact from an order granting probation, which is "deemed to be a final judgment" under Penal Code section 1237, subdivision (a), from which an appeal may be taken by the defendant.

plea bargain. (*Mancheno*, *supra*, 32 Cal.3d at p. 860.) "It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy. [Citations. ¶] The goal in providing a remedy for breach of the bargain is to redress the harm caused by the violation without prejudicing either party or curtailing the normal sentencing discretion of the trial judge. The remedy chosen will vary depending on the circumstances of each case. Factors to be considered include who broke the bargain and whether the violation was deliberate or inadvertent, whether circumstances have changed between entry of the plea and the time of sentencing, and whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate. Due process does not compel that a particular remedy be applied in all cases. [Citation. ¶] The usual remedies for violation of a plea bargain are to allow defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain. Courts find withdrawal of the plea to be the appropriate remedy when specifically enforcing the bargain would have limited the judge's sentencing discretion in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing. Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances." (*Id.* at pp. 860-861.)

In this instance, dismissal of all counts in the amended information—other than counts 1 and 5 to which defendant pleaded no contest—was an integral term of the plea bargain. Indeed, the discrepancy in the clerk's minutes notwithstanding, the court confirmed with the prosecution at the time defendant entered his no contest plea that "the People move to dismiss remaining counts and allegations" and that the court would take that motion under submission to be granted when sentencing occurred. And there were no changed circumstances or evidence indicating that the court later determined that it was inappropriate to dismiss counts 2 and 4 when it implemented the plea bargain by

granting probation on condition that defendant serve a four-month jail term and dismissed count 3. Rather, all indications are that the court's failure to dismiss counts 2 and 4 was a simple oversight that was not brought to the court's attention by the People or by defendant. Therefore, because "it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances" (*Mancheno*, *supra*, 32 Cal.3d at p. 861), specific performance of the terms of the plea bargain by dismissal of counts 2 and 4 is appropriate.

The parties disagree on the appropriate remedy. Defendant requests that the matter be remanded to the trial court with instructions that it dismiss counts 2 and 4, while the Attorney General contends that remand is unnecessary. We conclude that it is in the interests of judicial economy that we modify the probation order here to specifically enforce the plea bargain by including one of its terms that was omitted through oversight by the court and the parties. Remand would only serve to unnecessarily increase the costs to the parties and the taxpayers for no good purpose. (See *People v. Walker*, *supra*, 54 Cal.3d at p. 1029 [judicial economy warranted modifying judgment to reduce restitution fine to statutory minimum rather than remand to trial court to determine appropriate amount of fine].) Accordingly we will amend the probation order in superior court case number CC828915 to provide for the dismissal of count 2 and count 4, as well as count 3, pursuant to the prior motion of the People.

DISPOSITION

The order of August 6, 2009, granting probation in superior court case number CC828915 is amended to include an order, pursuant to the People's motion, dismissing count 2 and count 4 (in addition to the dismissal of count 3 as previously reflected in the order). The court clerk is directed to amend the probation order accordingly. As amended, the order granting probation is affirmed.

Duffy, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.